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No. 07-740

IN THE
Supreme Court of the United States

DEVIN DANIELS, BRYCE CLEMENTS, DAIMON FULLERTON, NICOLE MURROW, AND MAREN SANDLER, CLASS REPRESENTATIVES,

Petitioners,

v.

PHILIP MORRIS USA, INC., R.J. REYNOLDS TOBACCO CO., LORILLARD TOBACCO CO., AND BROWN & WILLIAMSON TOBACCO CORP.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Bates v. Dow Agrosciences LLC,
544 U.S. 431 (2005) 6

Cipollone v. Liggett Group Inc.,
505 U.S. 504 (1992) ..... passim

Good v. Altria Group, Inc., 501 F.3d 29
(1st Cir. 2007) 7

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001) ..... passim

Mangini v. R.J. Reynolds Tobacco Co.,
7 Cal.4th 1057 (1994) 3,4,7

Metro-Goldwyn-Mayer Studios Inc. v.
Grokster, Ltd., 545 U.S. 913 (2005) 10,11

Pittsburgh Press Co. v. Pittsburgh Comm'n on
Human Relations, 413 U.S. 376 (1973) 10

Rowe. v. *New Hampshire Motor Transp.*
Ass'n, No. 06-457, Slip. Op. (Feb. 20, 2008) 5

Stop Youth Addiction, Inc. v.
Lucky Stores, *Inc.*, 17 Cal. 4th 553,
950 P.2d 1096, 1094 (1998). 5

United States v. Philip Morris, 449 F. Supp. 2d 1 (D.D.C. 2006) 6

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 10

Statutes:

Cal. Pen. Code, Section 308 ..... passim

Other Materials:

S. Rep. No. 91-566 (1969) 5

The California Supreme Court held, as a matter of both (1) federal statute and (2) constitutional right, that companies in the business of marketing cigarettes are entitled to an exemption from the generally applicable state-law duty to refrain from encouraging (and profiting from) unlawful business transactions. These extraordinary rulings assuredly are not, as respondents claim, "factbound" (Opp. 1) applications of any decision of this Court. On the contrary, as our petition showed, the court below fundamentally misread *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001), as having effectively overruled *Cipollone* v. *Liggett Group Inc.*, 505 U.S. 504 (1992); it ignored *Lorillard*'s clear indications that State laws prohibiting the encouragement of unlawful behavior are, for obvious reasons, beyond the reach of the statutory preemption clause; and it took a view of the First Amendment at odds with decades of precedent.

Respondents' Brief in Opposition repeats and magnifies these errors, and fails to refute our demonstration that, given the importance of the social problem and state prerogatives at issue, this Court's review is warranted.

1. Respondents' central thesis is that the question presented here was "resolved" in *Lorillard*. Opp. 1, 8-11. That is manifestly untrue.

First, *Lorillard*, unlike *Cipollone* and this case, did not involve a particular application of a general state law duty, unrelated to tobacco. The duty the Massachusetts Attorney General sought to enforce was to refrain from advertising *cigarettes* in specified areas. The duty here is to refrain from unfair modes of business competition, including (but not limited to)

purposefully encouraging and profiting from unlawful commercial transactions. Thus, while *Lorillard* confirmed States' power to apply genereal laws to tobacco advertising, see 533 U.S. at 551, the result of the preemption decision below is that California may impose civil UCL liability for businesses that seek commercial advantage by promoting violations of laws relating to pornography, alcohol, gambling, copyrights, drug paraphernalia – but not those relating to cigarettes.

Second, the regulations held preempted in *Lorillard* were not limited to and arguably did not reach advertising targeted at minors. The regulations flatly proscribed advertising over a large percentage of the State and applied fully to advertising explicitly intended to communicate truthful information to adult smokers. See 533 U.S. at 573 (Thomas, J., concurring in part and concurring in the judgment) (noting that ban "cover[ed] as much as 90 percent of the three largest cities in Massachusetts," and was not limited to advertising containing "youthful imagery").[1]

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[1] The regulations in *Lorillard* were promulgated *after* Massachusetts and the tobacco companies had agreed to a MSA, which obliged the companies to refrain from targeted advertising. Thus, whereas that case dealt with advertising that was not targeted to youth – and involved a complete ban – this one involves only activities that *were* targeted to youth and concerns imposition of civil liability for those unlawful transactions only.

Although respondents now suggest (Opp. 9) that certiorari was granted in *Lorillard* to review decisions like *Mangini* v. *R.J. Reynolds Tobacco Co.*, 7 Cal.4th 1057, 875 P.2d 73 (1994), affirming States' power to impose liability for targeted advertising, certiorari was denied in *Mangini* itself, 513 U.S. 1016 (1994); the tobacco companies' merits briefs in *Lorillard* did not mention the decision; and the companies (represented by the counsel of record for respondents in this case) assured the Court that holding the *Massachusetts* regulations preempted would not require the Court to cast doubt on States' power to regulate (or prohibit) youth-targeted advertising and promotions. See Br. of Petitioners, No. 00-596 at 35-36 (stressing that Massachusetts regulations did not address advertising "targeted to children," but instead took a "blunderbuss approach").

Lorillard did not hold or even suggest that States were disabled from regulating, by criminal or civil laws, commercial behavior specifically intended (as was respondents' here) to induce young people to unlawfully purchase and smoke cigarettes. Rather, as explained in the petition, the *Lorillard* Court, consistent with these industry assurances, strongly indicated that State powers to deal with such activities were beyond the reach of the FCLAA preemption clause. 533 U.S. at 552.

Respondents (Opp. 18) endorse the California court's illogical understanding of the "exception" acknowledged in *Lorillard*, *i.e.*, that States have

power only to enforce criminal laws prohibiting promotion of cigarettes to minors, but not civil liability regimes. As we showed, (Pet. 24-25) this reading is contrary to the very First Amendment precedents from which the relevant part of the *Lorillard* opinion explicitly borrowed: indeed, it is blackletter First Amendment law that regulation is a less restrictive alternative than an outright ban – and civil liability raises less concern than criminal punishment.

2. Because this case is not controlled by *Lorillard*, respondents' preemption defense should have been analyzed – and rejected -- under *Cipollone*. The theory of preemption embraced by respondents (and the court below) is irreconcilable with the *holding* of *Cipollone* – *e.g.*, that state law fraud claims were *not* preempted – and it is telling that respondents, citing a *Cipollone* footnote, 505 U.S. at 529 n. 27, for the proposition that the "predicate legal duty" test should not be decided at "too high a level of generality," neglect to note that the same footnote rejects Justice Scalia's approach (and respondents') as taking an impermissibly low- level view.

3. To create some distance from *Cipollone*, respondents (Opp. 15-17) distort *Mangini* and California law. Although *Mangini* contained dictum about Penal Code Section 308, its holding was that, for preemption purposes, the "predicate duty" underlying a claim like the one here "is to not engage in unfair competition by advertising illegal conduct or encouraging others to violate the law." 875 P.2d at 80. Accordingly, the California Supreme Court's

Lorillard-influenced re-examination of Section 308 is largely beside the point.

Respondents' theory (Opp. 12-13), that the appropriate analysis would consider, not just the fair competition duty imposed by the UCL but also the "duty" under Penal Code Section 308, to not sell tobacco to minors ignores the text of the FCLAA. The statute preempts only state requirements and prohibitions "with respect to the advertising or promotion of any cigarettes," which Section 308's prohibitions plainly are not. Moreover, respondent's approach is inconsistent with California courts' characterization of UCL claims like this one as *not* "enforcing" the separate rule of state law, but resting instead upon an "independently actionable" obligation not to profit by promoting transactions violative of state law, *Stop Youth Addiction, Inc.* v. *Lucky Stores, Inc.*, 17 Cal. 4th 553, 566, 950 P.2d 1096, 1094 (1998).

Cipollone also rested on the historic allocation of power between State and federal government and, ultimately, on congressional purpose. 505 U.S. at 528-29 & nn. 25, 27. The prohibition against encouraging youth smoking is much closer to core traditional police power than is general advertising regulation, and is, to say the least, well beyond the limits of what Congress expected would be preempted in 1969. See *Cipollone*, 505 U.S. at 529 n.25 (quoting S. Rep. No. 91-566 at 12 (1969)). Cf. *Rowe.* v. *New Hampshire Motor Transp. Ass'n*, No. 06-457, Slip. Op. at 1 (Feb. 20, 2008) ("[N]o comprehensive federal law currently exists to

prevent tobacco sellers from exploiting the underage market.") (Ginsburg, J., concurring).

Although Respondents refer derisively to "Petitioners' subjective-intent-defeats-preemption" theory, Opp. 19, it is their contrary "preemption-protects-purposeful-youth-targeting" theory that strains credulity. It is simply implausible that Congress – having been assured by the tobacco companies that they would not market to minors, see Pet. 27-29 -- intended to license cigarette companies to advertise directly to the youth markets, in violation of general state fair businesses competition laws. Enforcing such state laws does not implicate the purposes of FCLAA preemption, *i.e.*, protecting the flow of (lawful) commerce in cigarettes against conflicting and confusing regulations, *Lorillard,* 533 U.S. at 531 (citing 15 U.S.C. 1331): A federal regime that preserves' States' authority to control youth-targeted marketing would not affect companies' ability to advertise and sell cigarettes to adult smokers. Indeed, such regulation preserves the integrity of the national market by preventing firms from gaining a competitive advantage by promoting illicit sales and use of cigarettes.[2]

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[2] As our petition noted, the consonance of California's UCL with the FTC's consumer protection policies (on which the UCL was based) is a reason for upholding, not preempting, petitioners' state cause of action. See Pet. 5-6, 20-22 (discussing *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431 (2005). See also *United States* v. *Philip Morris, Inc.*, 363 F. Supp. 2d 72, 80 (D.C. 2003) ("*Cipollone* necessarily rejected the

4. Respondents consistently mischaracterize the UCL claim here and the evidence supporting it. Attempting to shoe-horn this case into the *Lorillard* mold, they claim that petitioners sought to predicate liability on the mere fact that adolescents were *exposed* to respondents' cigarette advertisements. (Opp. 19). But that misrepresents the record. The courts below were presented with ample evidence that respondents' development marketing plans with the specific purpose of inducing minors to purchase and smoke their cigarettes, thereby creating new generations of addicted, brand-loyal customers. See Pet. 9-10. The decision of the California court was not, as respondents claim (Opp. 19), based upon any determination that petitioners' evidence of targeting was *inadequate*; instead, the court below – after having affirmed in *Mangini* that the FCLAA does not preempt a UCL targeting claim – concluded (erroneously) that *Lorillard* had rendered such a claim categorically preempted.[3]

Defendant's arguments that the FTC has exclusive authority over all tobacco advertising, marketing, promotion, and warning claims.").

[3] On January 18, 2008, this Court granted certiorari in *Altria Group, Inc.* v. *Good*, 07-562, to review a First Circuit decision, 501 F.3d 29 (1st Cir. 2007), that upheld a claim under the Maine Unfair Trade Practices Act against a FCLAA preemption defense. This Court in *Good* will address for the first time the impact of the FCLAA – and *Cipollone* and *Lorillard* – on private claims arising under state unfair competition laws. Given the substantial overlap of

5. The decision below further held that, statutory preemption aside, respondents enjoy a *First Amendment right* to direct cigarette advertising to California youth, with the specific purpose of encouraging them to purchase and smoke cigarettes, in violation of State law and that, under this Court's commercial speech doctrine, California may address youth smoking only by prosecuting "direct sellers" and teenagers, leaving manufacturers free to encourage (and derive competitive advantage from) unlawful sales.

a. Respondents protest that this does not amount to a "license," pointing to their obligation under the 1998 MSA to refrain from youth-targeted advertising and the FTC's enforcement action against their "Joe Camel" campaign, but that is precisely what the First Amendment ruling below confers. The FTC's authority, no less than the State's, is limited by the First Amendment – if a California suit claiming unfair trade practice is unconstitutional, so too is a federal suit (indeed, while respondents routinely deploy FTC and FCC regulation as a shield when State regulation is being challenged, they have taken care not to concede the constitutionality of these federal measures). And as respondents well know, the MSA imposed *no limit* whatsoever on the targeted advertising at issue here (or on the advertising of non-signatories); that respondents' (contractual) promise to refrain from youth targeting had to be purchased for valuable

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issues, see Pet. at 19, this petition should be held for *Good* if is not granted.

consideration (*i.e.*, dismissal of claims against them in the billions of dollars), is proof that respondents *do* indeed have a license.

2. As the petition showed, the First Amendment ruling below, far from a routine, fact-bound application of this Court's *Central Hudson* case law, represents a dramatic and consequential break with decades of commercial speech precedent.

In familiar fashion, respondents' answer begins (and largely ends) by directing the Court to *Lorillard*, insisting that that decision, in sustaining a First Amendment challenge to a tobacco advertising regulation, conferred a constitutional *carte blanche* to market cigarettes to minors. But here again, the *Lorillard* decision respondents brandish bears no resemblance to the one this Court handed down. To be sure, *Lorillard* observed that "'so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products.'" (Opp. at 21, quoting 533 U.S. at 571). But it did so in striking down a sweeping regulations that prohibited advertising specifically directed at adults. *Lorillard* did not hold that the industry has a "protected interest in communicating information about its products" *to youth* – let alone to encourage youth to purchase cigarettes, in violation of State law. On the contrary, the petitioners there labored to show that no such question was before the Court, see *supra*, – as it is in this case – and the Court's opinion pointedly equated youth-targeted advertising with speech relating to unlawful commercial transactions,

which enjoys no First Amendment protection. 533 U.S. at 552.

As the petition showed, the First Amendment rules adopted below – (1) that communications *intended* to encourage unlawful commercial transactions are constitutionally protected, so long as the audience might include someone for whom conduct was lawful and (2) that States may not hold those who encourage (and profit from) illegal activity civilly liable unless they are direct participants in illegal behavior – are in square conflict with this Court's decisions in *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973), *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 492 (1982), and *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913 (2005).

Respondents omit any discussion of the first two decisions and seek to wave *Grokster* aside, on the ground that it was a Copyright Act, rather than a "First Amendment," case. But this cannot do: under the decision below, the rule this Court announced in *Grokster* (itself grounded on decades of case law under the Patent Act) – *i.*e., that a company may be civilly liable for a third party's unlawful conduct based on its advertising encouraging such conduct – would be facially unconstitutional. Nor was the Court, as respondents imply, focused narrowly on statutory matters: no fewer than five amicus briefs in *Grokster* devoted substantial discussion to First Amendment arguments against (and in favor) of the rule the Court adopted.

Nor can respondents' claim that their conduct falls outside California's (criminal) law of aiding and abetting support the decision below. Petitioners are not seeking criminal punishment here – they are trying to impose civil liability on the same basis as the Copyright and Patent Acts do, and the court below interpreted the First Amendment as disabling Government (State or Federal) from doing so.

Unable to defend the decision the California Supreme Court issued, respondents advance an entirely different rationale – Petitioners' claims of intentional targeting were so "overbroad" (Opp. 23), they say, that the court below was entitled to throw the case out on First Amendment grounds. Unsurprisingly, respondents in advancing this argument do not present petitioners' claims and supporting evidence in an accurate light, let alone the one must favorable to the non-movants. Below, petitioners did not rest on respondents' advertisements, but adduced direct, inculpatory evidence of specific intent to induce unlawful purchases and smoking. See., *e.g.*, Pet. 9-10. But even if some of the advertisements challenged were entitled to constitutional protection, it would not follow that respondents could not be held liable for actions that *were* taken with the intent of inducing youth smoking, or that rejection of the whole suit was proper.

Finally, respondents (following the decision below) continue to place a thumb on the constitutional scale, by treating this case – which seeks only civil liability for actual unlawful sales that respondents encouraged and profited from -- *as*

if it concerned California's power to proscribe entirely particular advertisements or to criminally punish companies for advertising. Although some advertising might be so conscience-shocking that a State could ban it across-the-board ("kids: buy this month's *Hustler* magazine"; "use Grokster to circumvent copyright laws") or even impose criminal punishment, this case seeks only to hold defendants civilly liable for their role in unlawful transactions they directly encouraged and profited from.[4]

Respondents' effort to prop up the lower court's "narrow tailoring" analysis – or at least depict it as "fact-bound" – likewise cannot succeed. As the petition explained, the decision below – in pronouncing the UCL unconstitutional as unnecessary to accomplishment of the State's interest in discouraging youth smoking – committed two large errors of First Amendment law. The court simply ignored two *other* substantial governmental interests served by UCL liability (1) in regulating

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[4] Indeed, California's liability regime, if anything, under-deters: the evidence shows that respondents sought to induce 14 year olds to smoke their cigarette brands, not only to reap the profits from four additional years of sales, but to increase the likelihood that these individuals would be loyal (addicted) customers from age 18 onwards. Thus, it might still be in tobacco companies' economic interest to promote such behavior, even if they had to forfeit proceeds of the initial unlawful sales. But under the regime sanctioned here, matters are more stark: a company that shows respect for California's laws governing youth cigarette purchases would be at a grave competitive disadvantage vis-à-vis a competitor that advertises its brands to minors.

commercial behavior, so businesses that respect policy choices reflected in California law are not competitively disadvantaged for having done so; and (2) in expressing moral disapproval of those who encourage (and profit from) youth tobacco purchases. The State Supreme Court's conclusion, that patchwork of point-of-sale enforcement and antismoking education is sufficient to stem the tide of youth smoking (or that the 1998 MSA, which by its terms has no application to the conduct at issue here, should be factored into the narrow tailoring analysis) is empirically implausible and shows far less deference for the State's choice of means than this Court's precedents demand.[5]

[5] Given that extent to which Section 308 can be – and is – violated without an unlawful sale, *e.g.*, when a minor smokes cigarettes purchased by an 18-year-old, even 100% enforcement at the point of sale could not be sufficient to fully overcome the (intended) effects of respondents' advertising efforts.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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